IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

WILLIAM E. SPAETH, JR.,	)	Docket No.
	)	08-56 MAY 12 2008
Petitioner,	)	
		GEORGIA SUPREME COURT NO. S07C1769
		GEORGIA COURT OF APPEALS NO. A07A0718
v.	)	
CHEROKEE CENTER	)	
FOR CHANGE, INC.,	)	
a Georgia Corporation, and	)	
BETH SAVINO, LPC	)	
Respondents.	)	

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PETITION FOR A WRIT OF CERTIORARI

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- Speir v. Williams, 146 Ga. App. 880 (247 SE2d 549)
- TXO, 509 U.S., at 456; Haslip, 499 U.S., at 21, 22.
- Cf. TXO, 509 U.S., at 456.

STATUTES

- 28 U.S.C. § 1257
- The First Amendment of the U.S. Constitution
- The Seventh Amendment of the U.S. Constitution
- The Fourteenth Amendment of the U.S. Constitution
- Health Insurance Portability & Accountability Act
- 42 U.S.C. § 201 et seq.
- O.C.G.A. § 24-9-21
- The GA Composite Board of Professional Counselors Therapists Rule 135-7-0.3
- O.C.G.A. § 51-12-5.1(b)
- O.C.G.A. § 5-6-36(a)
- O.C.G.A. § 5-6-34(a)(1)
- O.C.G.A. § 9-11-50
- 42 U.S.C. § 1320d-7 (a) (2)
- O.C.G.A. § 51-12-5.1
- OCGA § 24-9-21 (7)
- 45 CFR § 164.512(e)(1)
- Privacy Rule 45 CFR § 164.508 (c) (1)
- 45 CFR § 164.508 (c) (2)
- O.C.G.A. § 2-9-21
- North Carolina Rules of Civil Procedure 12(b)(2)&(6)

Questions Presented for Review

1) Does an improper directed verdict violate the United States Constitution's provision of separation of powers among the government branches, violating the right to trial by jury, due process, and the right to remedy for a tort injury if, after reasonable interpretation and a preponderance of the evidence, including expert testimony, a jury could have found professional malpractice and/or a breach of fiduciary duty by a deviation in a psychotherapist's standard of care in releasing confidential communications, as compared to an average prudent and reputable member of that profession?

2) Is the United States Constitution's provision for a right to equal protection violated when and in consideration of the federal Health Insurance Portability and Accountability Act ("HIPAA") and its relevant exception, wherein HIPAA standards do not

preempt state law if the state law relates to the privacy of the individually identifiable health information is "more stringent" than HIPAA's requirements, is interpreted and decided in The Supreme Court of Georgia in a way that conflicts with an interpretation and decision by the North Carolina Court of Appeals, both courts of last resort?

3) Is it possible that any presented case, alleging the improper release of confidential communication or protected health information, was decidedly not heard by The Supreme Court of Georgia because it generally decided, on May 14, 2007, in any such case, that the federal Health Insurance Portability and Accountability Act ("HIPAA") preempts any state law that conflicts with it and, consequently, the rights protected by either the Georgia or United States Constitutions were not considered on a case-by-case basis?

BRIEF FOR PETITIONER

OPINIONS BELOW

Petitioner's Writ of Certiorari to The Supreme Court of Georgia was denied on January 7, 2008, whereupon and on January 17, 2008, Petitioner timely filed a Motion for Reconsideration and a Motion to Stay Remitter, both of which were denied by The Supreme Court of Georgia on February 11, 2008. The opinion of The Court of Appeals of The State of Georgia, which does not have a citation yet, was remitted on February 13, 2008 (mailed February 14, 2008). The trial court's September 13, 2006 order, granting Respondents directed verdict, is unreported.

JURISDICTION

Petitioner's Motion for Reconsideration of his Petition for Writ of Certiorari was denied by The Supreme Court of Georgia on February 11, 2008. The Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides:

> "[A] In Suits at common law, where the value in the controversy shall exceed twenty dollars, [1] the right of trial by jury shall be preserved, and [2] no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

Section One of the Fourteenth Amendment of the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws."

While privacy is nowhere mentioned therein, it is one of the values served and protected by the First Amendment, through its protection of associational rights, and by the Third, the Fourth, and the Fifth Amendments as well. This penumbral right is protected by one Amendment or a complex of Amendments despite the absence of a specific reference. *GRISWOLD v. CONNECTICUT, 381 U.S. 479 (1965)*

STATEMENT OF THE CASE

Respondent Cherokee Center for Change, Inc. is engaged in the business of providing mental health, marriage, and family counseling. Respondent

Beth Savino, LPC is a Professional Counselor licensed by the State of Georgia.

On or about May 9, 2001, Petitioner's then-wife, filed for divorce. On May 19, 2001, Petitioner and his then-wife voluntarily attended their first marital counseling session for two (2) hours at the Respondent Center. Petitioner and his then-wife filled out numerous forms at the Respondent Center that day, including a "Client Information Form", a "Missed Sessions & Cancellation Policy" form and a "Consent Form".

Petitioner and his then ex-wife again voluntarily met with Respondent on May 26, 2001 for a one (1) hour session. Petitioner, by himself voluntarily met with Respondent on June 2, 2001 for one (1) hour. Respondents never requested a signed written release from Petitioner for any purpose. Respondents never received a signed, written release

from Petitioner. Respondent alleges to have received a subpoena (not tendered into evidence at trial) from the divorce court requiring her to appear in court with her documents, concerning the marriage counseling.

The marital counseling was unsuccessful and a divorce proceeding ensued. Respondent was contacted by Petitioner's then-wife's attorney, prior to the Rule Nisi Hearing in the divorce action, held on July 3, 2001 to assist in her preparation as an expert witness. Furthermore, on July 26, 2001, Respondent was contacted by the Guardian Ad Litem ("Guardian"), to whom she discussed Petitioner's privileged communications from the voluntary marriage counseling. The divorce court entered its order appointing a Guardian on August 2, 2001.

A. MOTION FOR SUMMARY JUDGMENT

On August 2, 2006, the assigned, trial Judge entered an Order, denying Respondents' Motion for Summary Judgment and, wherein the he found that

> "...With regard to Plaintiff's claim for punitive damages, a breach of fiduciary duties is sufficient to support an award of punitive damages. *Caswell v. Jordan, 184 Ga. App. 755, 760 (1987).* Since the Court finds, after considering the evidence in the light most favorable to the Plaintiff, that there exists a genuine issue of material fact as to Plaintiff's claim for breach of fiduciary duty, the Court finds that the question of whether Defendants' actions amounted to a breach of fiduciary duty and whether Plaintiff should be award punitive damages for said breach should be a question for the jury."

On August 8, 2006, the assigned, trial Judge executed and entered a consented, Consolidated Pre-Trial Order, signed by both parties at the calendar call on August 2, 2006. On Monday, August 28, 2006, the assigned, trial Judge communicated that he would be "out of town" until Wednesday, August 30, 2006 and, to that end, asked both parties to report again on Wednesday, August 30, 2006 at 9:00 a.m.

When arriving at Court on Wednesday, August 30, Petitioner learned from the trial court that the assigned, trial Judge would still be out of town until the following morning but that "it was very urgent" that Petitioner promptly report on Thursday, August 31, 2006 at 9:00 a.m. Upon arriving at Court on Thursday, August 31. Petitioner learned that a Senior Judge, from the county of Petitioner's divorce case, had "been asked to assist...in Cherokee County this week in presiding over [the assigned, trial Judge's] civil and domestic trial calendar."

Absent any waivers or release of confidential information whatsoever, the trial Court, on August 31, 2006 and September 1, 2006 heard the case on [1] Professional malpractice in violation of O.C.G.A. § 24-9-21 and The Georgia Composite Board of Professional Counselors and Marriage and Family

Therapists Rule 135-7-0.3, [II] Breach of fiduciary duty, and [III] Breach of contract.

At trial on August 31, 2006, Petitioner's expert witness with a Ph.D. in Clinical Psychology, who, "for seven years. previously served as the Legal and Legislative Committee Chair of the Psychological Association" testified:

> "...that on more than one occasion [Respondent] Ms. Savino talked with other people without expressed written permission of release of information. So she was not authorized to do that. That would be a violation of the Georgia Code 24-9-21. It would also be in violation of the rules and regulations of the Licensing Board that governs professional counseling...in regards to the subpoena...all communications between psychologist and client are privileged communication and cannot be released without written permission by the client."

Respondents failed to present any contrary evidence, especially noting the absence of expert witness testimony.

Moreover, during Repondent Savino's cross-examination response, she stated:

"...What I can say to you is, and anyone who knows me knows this, that for 15 years now, I'm a witness for the child. As far as I'm concerned, in divorce cases or any cases that I testify in, I don't care about either of the parties..." and, when asked, "Do you have any regrets about what you did?" she responded, "Just in agreeing to see [Petitioner] as a client..."

...demonstrating willful misconduct, malice, wantonness, oppression, and that entire want of care that would raise the presumption of a conscious indifference to consequences, consistent with O.C.G.A. § 51-12-5.1(b).

Furthermore and at trial, Respondent presented evidence of nominal damages in the amount of $2,500 for unwarranted expert witness fees, paid to Respondent Savino, that were diverted away from the Minor Child in [Respondent's] divorce case, an issue for the jury that was precluded by the trial Court's subsequent grant of a directed verdict.

B. ORAL MOTION FOR DIRECTED VERDICT

On September 1, 2006, the substitute, trial Judge granted Respondents' verbal Motion for Directed Verdict and issuing a Final Order on the same. Respondents contended and, in that Final Order, the trial court reasoned that:

> "evidence presented at trial further showed that [Respondent] Ms. Savino received a subpoena on June 28, 2004, compelling her to appear in court during [Respondent's] divorce case on July 3, 2004..."

However, this alleged subpoena was never tendered into evidence as an exhibit and, as such, not made part of the record, explaining why Respondents failed (were unable) to reference the subpoena as an exhibit (by specific volume or part of the record) in their subsequent Court of Appeals brief. Furthermore and therefore, it should not have been relied upon by the trial court as a legal basis for having granted [Respondents'] Motion for Directed Verdict on the claim for breach of contract.

COURT OF APPEALS OF THE STATE OF GA

Consistent with O.C.G.A. § 5-6-36(a), Petitioner elected not to file a motion for new trial first and, instead, appealed directly to The Court of Appeals of The State of Georgia. Petitioner preserved all enumeration of errors by filing a timely Notice of Appeal on October 11, 2006, pursuant to O.C.G.A. § 5-6-34(a)(1), within thirty (30) days, of the trial Court's Final Order, which was filed on September 13, 2006. The case was docketed by The Court of Appeals of The State of Georgia on November 29, 2006. Petitioner filed, with The Court of Appeals of The State of Georgia, a timely brief on December 19, 2006, wherein he asserted:

"The court erred when it granted [Respondents'] Motion for Directed Verdict, subjecting the case to a higher burden of proof on the issue of causation than a plaintiff in incommensurable negligence cases and absent any consideration of the standard set forth in O.C.G.A § 51-12-5.1(b) for punitive damages. The issue of punitive damages should have been a question for the

jury. Even if the facts in the case were not contradicted, the duty as to whether or not negligence should be inferred is particularly within the exclusive province of the jury."

Petitioner filed, with The Court of Appeals of The State of Georgia a timely reply brief on January 27, 2007, wherein he asserted that:

"A detailed review of Respondents' citation, *Carden v. Burckhalter, 214 Ga. App. 487, 448 SE2d 251 (1994)*, shows, 'A directed verdict is authorized only when "there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict.' OCGA § 9-11-50 (a). A grant of directed verdict is a ruling that the evidence and all reasonable deductions therefrom demand a particular verdict. OCGA 9-11-50 (a). It is illogical to say such a finding will be upheld if there is "any evidence" to support it. A grant of directed verdict can be upheld only where we determine that all the evidence

demands that verdict. This requires a de novo review. It was said in *Ga. Dept. of Human Resources v. Montgomery, 248 Ga. 465, 466 (284 SE2d 263)* that "[i]n Georgia, the standard used to review the grant or denial of a directed verdict is the 'any evidence' test"; however, this was used to explain "substantial evidence" and it was dictum. Also, the case cited for the proposition, *Speir v. Williams, 146 Ga. App. 880 (247 SE2d 549)*, never made it. A "rule" that the standard for review of the grant of directed verdict is the 'any evidence' test is often either quoted in dictum (e.g., where the review is of a denial of directed verdict) or is not used in the sense advocated by appellees. *See Norfolk Southern Corp. v. Smith, 262 Ga. 80, 84 (414 SE2d 485); Emory Univ. v. Levitas, 260 Ga. 894, 897 (401 SE2d 691); Southern R. Co. v. Lawson, 256 Ga. 798-799, 800 (1) (a) (353 SE2d 191); Moore v. Allen, 255 Ga. 430 (339 SE2d 243); Skelton v. Skelton, 251 Ga. 631 (308 SE2d 838);*

Hixson-Hopkins Autoplex v. Custom Coaches. 208 Ga. App. 820 (432 SE2d 224). See also Atkinson v. Allstate Ins. Co., 182 Ga. App. 50 (354 SE2d 866), which involved a denial of directed verdict. It is correct to say that a directed verdict cannot be granted if there is 'any evidence' to support a contrary verdict, but there cannot be 'some evidence' that all the evidence demands a particular verdict."

This demonstrates that, in the instant case: 1) There is a conflict in the evidence as to material issues, at the very least; 2) There is proof of professional malpractice, breach of fiduciary duty, and breach of contract; and 3) There is sufficient evidence to create issues of fact.

The Court of Appeals of The State of Georgia released an opinion on July 3, 2007 (See Appendix A). Petitioner filed a Notice of Intent to Petition for a Writ of Certiorari with The Court of Appeals of The

State of Georgia and a Motion for Reconsideration on July 13, 2007 wherein he asserted:

"a detailed review of that hardly comparable "landlord-tenant" case, regarding property damage, cited in this Honorable Court's opinion, *Hodges, v. Vara, 268 Ga. App. 815, 818 (1) (a) (603 SE2d 327) (2004)*, a motion for directed verdict should not be granted where there exists even slight material issues of fact, because the trial court is substituting its judgment for the jury's; only when there is an absence of evidence or when no evidence supports an essential element of the case should a directed verdict be granted, because the trial judge takes the determination of the facts from the jury. O.C.G.A. § 9-11-50; *Johnson v. Curenton, 127 Ga. App. 687, 688, 195 S.E.2d 279 (1972)*. In that same citation in [The Court of Appeals of The State of Georgia's] opinion: Although [property] damages must be proven with

reasonable certainty and without speculation, it is not necessary that the party prove exact figures. *Paul Davis Systems of Savannah v. Peth, 201 Ga.App. 734, 735-736(1), 412 S.E.2d 279 (1991); Moultrie Farm Center v. Sparkman, 171 Ga.App. 736, 740(6), 320 S.E.2d 863 (1984),* noting that, in any event, [Respondent] presented evidence of nominal damages in the amount $2,500 for unwarranted expert witness fees paid to Respondent Savino.

THE SUPREME COURT OF GEORGIA

The Court of Appeals denied Petitioner's Motion for Reconsideration on July 18, 2007. Petitioner filed a Petition for Writ of Certiorari to The Supreme Court of Georgia on August 3, 2007 wherein he cited that, on May 14, 2007, The Supreme Court of Georgia issued an opinion in *Allen et al. v. Wright, 282 Ga. 9 (644 SE2d 814) (May 14, 2007),* wherein it found that the federal Health Insurance

Portability and Accountability Act ("HIPAA") preempts any state law that conflicts with it. In response, Respondent rationalized:

1) HIPAA and the related provisions established in the Code of Federal Regulations expressly supersede any contrary provisions of Georgia statutes (and the interpretation of case law – emphasis added) except as provided in 42 U.S.C. § 1320d-7 (a) (2). Under the relevant exception, HIPAA and its standards do not preempt state law if the state law relates to the privacy of the individually identifiable health information is "more stringent" than HIPAA's requirements.

2) When one has been victimized by a breach of fiduciary duty, it is erroneous to preclude consideration of the standards set forth in O.C.G.A. § 51-12-5.1 for punitive damages, abolishing the judicial remedy and social mechanism to punish,

penalize, and deter future misconduct by the defendant and professionals in the same capacity. It is reasonable to assume that the trusting public, would be aghast to learn that the judicial system "looks the other way" when there has been a violation of the "mental health privilege". It follows that many candidate patients would be so concerned that they would abandon psychotherapy as a constructive resource when seeking help when they find themselves in a life crisis that they are unable to resolve by themselves and with the help of their family and friends. Furthermore and in recent opinions, The Supreme Court of Georgia has recognized that modern public policy strongly favors the confidential and fiduciary relationship that exists between a patient and their therapist, rooted in the logic that society benefits from the sanctity of the same.

Petitioner's Writ of Certiorari was denied on January 7, 2008, whereupon and on January 17, 2008, Petitioner timely filed a Motion for Reconsideration, wherein he showed that Honorable Court a North Carolina Court of Appeals case, *Acosta v. Faber, 638 S.E.2d 246 (N.C. App., Dec. 19, 2006)*, wherein:

> "The North Carolina Court of Appeals agreed that the complaint made no attempt to plead a cause of action created by HIPAA itself, so "dismissal on the grounds that HIPAA does not grant an individual a private cause of action was improper."

...in contrast to that May 14, 2007 opinion, *Allen et al. v. Wright, 282 Ga. 9 (644 SE2d 814) (May 14, 2007)*, wherein The Supreme Court of Georgia found that the federal Health Insurance Portability and Accountability Act ("HIPAA") preempts any state law that conflicts with it.

Petitioner's Motion for Reconsideration and Motion to Stay Remitter were denied by The Supreme Court of Georgia on February 11, 2008.

ARGUMENT SUPPORTING THIS PETITION

Twelve years ago, this Honorable Court recognized the psychotherapist privilege under Rule 501 of the Federal Rules of Evidence, based in part on the recognition of the privilege by each of the fifty states. *Jaffee v. Redmond, 518 U. S. 1, 12(116 SC 1923. 135 LE2d 337) (1996)* In 1995, the scope of Georgia's privilege was statutorily expanded to cover confidential communications between a patient and a licensed clinical social worker, clinical nurse specialist in mental health, licensed marriage and family therapist, and licensed professional counselor. Ga. L. 1995, p. 858, § 1;OCGA § 24-9-21 (7). In light of that expansion, it is appropriate to refer to the privilege at issue as the "mental health privilege."

See *Kennestone Hosp. v. Hopson, 273 Ga. 145, 148 (538 SE2d 742) (2000).*

"Protecting confidential mental health communications from disclosure serves an important private interest and a public interest." *Jaffee v. Redmond, supra, 513 U. S. at 10-11.* As far as the individual patient's private interest is concerned, confidentiality is a sine qua non for successful psychotherapeutic treatment since a psychotherapist's ability to help a patient is completely dependent upon the patient's willingness and ability to talk freely, and assurances of confidentiality and privilege foster the psychotherapist's ability to function. *Id., 518 U. S. at 10. See also Kennestone Hosp. v. Hopson, supra, 273 Ga. at 148,* where we observed that "'[t]he purpose of the privilege is to encourage the patient to talk freely without fear of disclosure and embarrassment, thus enabling the psychiatrist to render effective treatment of the patient's emotional or mental disorders.' *[Cit.]* Since '[t]he mental health of our citizenry ... is a public good of transcendent importance[,]' the privilege serves the public interest "by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Jaffee v. Redmond, supra, 513 U. S. at 11.*

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing

unlawful conduct and deterring its repetition. *Gertz v. Robert Welch, Inc.*, *418 U.S. 323, 350 (1974); Newport v. Fact Concerts, Inc.*, *453 U.S. 247, 266-267 (1981); Haslip, 499 U.S., at 22.* In our federal system, "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. See *TXO, 509 U.S., at 456; Haslip, 499 U.S., at 21, 22.* Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *Cf. TXO, 509 U.S., at 456.* For that reason, the federal excessiveness inquiry appropriately begins with an

identification of the state interests that a punitive award is designed to serve.

Similarly, the improper and arbitrary granting of a directed verdict, precluding a jury's preponderance of evidence and eliminating the possibility of noneconomic damages, violates the Due Process Clause of the Fourteenth Amendment and ignores the legitimate interest of punishing the Respondents toward deterring future misconduct. Furthermore, such action adversely impacts the plaintiff(s) as it changes the substantive legal standard of liability and eliminates the ability to recover damages. Certainly, Respondents conduct is sufficiently reprehensible to give rise to tort liability with respect to the laws of the State of Georgia and at least a reasonable consideration of punitive damages as determined by a jury.

This Honorable Court has consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. *TXO, 509 U.S., at 458. [n37]* Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. Certainly, "[a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'" *TXO, 509 U.S., at 458 (quoting Haslip, 499 U.S., at 18).*

HIPAA PROCEDURES IGNORED BY RESPONDENTS

HIPAA and the related provisions established in the Code of Federal Regulations expressly supersede any contrary provisions of State law except as provided in 42 U.S.C. § 1320d-7 (a) (2). Under the relevant exception, HIPAA and its standards do not preempt state law if the state law relates to the privacy of the individually identifiable health information is "more stringent" than HIPAA's requirements. *[Cits.] Law v. Zuckerman, 307Fsupp2d 705, 708-709 (A) (D. Md. 2004).*

Under HIPAA's preempting 45 CFR § 164.512(e)(1), "A covered entity may disclose protected health information in the course of any judicial or administrative proceeding (ii) in response to a subpoena, discovery request, or other lawful

process, that is not accompanied by an order of a court or administrative tribunal if (A) the covered entity receives a satisfactory assurance as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request...(iii) a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address); (B) The notice includes sufficient information about the litigation or proceeding in

which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and (C) The time for the individual to raise objections to the court or administrative tribunal has elapsed and: (1) No objections were filed; or (2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosure being sought are consistent with such resolution." In consideration of this HIPPA rule and the evidence presented at trial, Appellant's then-wife's attorney made no effort whatsoever to engage Appellant in a "satisfactory assurance" process, in compliance with HIPAA.

Furthermore and under HIPAA's preempting 45 CFR § 164.512(e)(1). "A covered entity may disclose protected health information in the course of any judicial or administrative proceeding (i) in

response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order." The language in the consent order in the instant action does not comport with the HIPAA requirements for valid authorizations. The Privacy Rule 45 CFR § 164.508 (c) (1) prescribes with the specificity the elements required of a valid authorization: 1) a "specific and meaningful" description of the information to be released; 2) identification of the person(s) authorized to release the information; 3) identification of the person(s) authorized to receive the information; 4) statement of the purpose of the release; 5) expiration date or "expiration event that relates to the individual [who is the subject of the medical records] or the purpose of the [release]"; and 6) individual's signature and date. In addition, the Privacy Rule requires authorizations to include statements,

"adequate to place the individual on notice of" certain rights such as the individual's right to revoke the authorization. 45 CFR § 164.508 (c) (2).

NORTH CAROLINA DECISION

Acosta v. Faber, 638 S.E.2d 246 (N.C. App., Dec. 19, 2006)

NORTH CAROLINA CASE BACKGROUND

This action arose from a child custody dispute between a formerly married couple in Hertford County, North Carolina. Heather Acosta (formerly Heather Smith), the plaintiff and former wife of Chris Smith, commenced the present civil action in May 2005 against four individuals. Those defendants were alleged to have improperly accessed her electronically stored confidential psychiatric and other medical or health care records and published or otherwise disseminated information contained in the records to third parties without authorization of

consent, causing plaintiff "severe emotional distress, humiliation and embarrassment." Plaintiff sought punitive damages against Defendants on the ground that their actions were "done intentionally, willfully, maliciously and with reckless indifference to the rights of the Plaintiff." [Compare to Petitioner's complaint for punitive damages in the instant case, wherein Respondents' "actions showed willful misconduct, fraud, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to consequences."]

The complaint contended that Dr. Faber "negligently allowed Defendant, Robin Byrum, to use his medical records access code to obtain Plaintiff's confidential healthcare records and information in violation of the rules and regulations established by University Health Systems and Roanoke Chowan

Hospital and the Health Insurance Portability and Accountability Act of 1996 (HIPAA)." The complaint further alleged that "Dr. Faber had an express and implied duty of reasonable care not to allow Robin Byrum or others without medical or other proper authorization to access the Plaintiff's confidential healthcare records, and in so allowing, he breached this duty of reasonable care." The complaint also alleged that "Dr. Faber was a 'covered entity' as defined by" HIPAA. [Compare to Petitioner's complaint for Professional Malpractice in the instant case in violation of The Georgia Composite Board of Professional Counselors, Social Workers, and Marriage and Family Therapists Rule 135-7-.03 and O.C.G.A. § 2-9-21].

MOTION TO DISMISS IN NC

[Compare to Directed Verdict in the Instant Case]

Dr. Faber responded to the complaint with a motion to dismiss under North Carolina Rules of Civil Procedure 12(b)(2)[lack of personal jurisdiction] and 12(b)(6) [failure to state a claim recognized under law]. With respect to failure to state a claim, he asserted that HIPAA "does not grant an individual a private cause of action," and that plaintiff failed to secure the certificate by a physician that North Carolina law requires as a prerequisite to bringing a malpractice action.

On August 5, 2005, the motion was heard before Superior Court Judge W. Russell Duke, Jr., without "live testimony or other evidence," and without legal memoranda, based on "argument of counsel." On September 8, 2005, Judge Duke signed an order stating that "after reviewing the complaint,

the Court finds that the Motion should be allowed," and dismissing the complaint as to Dr. Faber "with prejudice." The Court, in accordance with local practice, was not obliged to state findings of fact or conclusions of law unless expressly requested to do so, which neither party did. [It should be duly noted that Petitioner orally requested "Findings of Fact and Conclusions of Law" in the instant case].

APPEAL IN THE NORTH CAROLINA CASE

Several pages of plaintiff-appellant's brief developed the argument that the complaint sufficiently pleaded a claim for "negligent infliction of emotional distress." Under North Carolina law, this requires a plaintiff to establish that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe

emotional distress. In supporting the presence of factual allegations establishing those three elements, plaintiff argued that the complaint sufficiently "alleges negligence, and a breach of Faber's express and implied duty of reasonable care not to allow Robin Byrum or others without medical or other proper authorization to access the Plaintiff's confidential healthcare records." [As in the instant case] Nowhere in this discussion did plaintiff mention HIPAA. Only later in the brief, while denying that the complaint purports to state a claim under HIPAA, did plaintiff state that the complaint "referenced HIPAA in establishing Defendant Faber's duty of care owed to Plaintiff." Specifically, HIPAA "provided a basis for establishing Defendant Faber's knowledge of and existence of his duty of reasonable care to prevent Defendant Byrum from improperly accessing Plaintiff's healthcare records using Faber's medical access code."

ARGUMENTS IN THE NORTH CAROLINA CASE

Dr. Faber's appellee brief devoted only perfunctory attention to most of the grounds addressed by the plaintiff and focused heavily on the inadequacy of the negligent infliction of emotional distress allegations. First, he contended that to establish Faber's negligence through entrusting his access code to his office manager, the "plaintiff must allege that the defendant knew or should have known that the person to whom it was entrusted was likely to cause injury to others in its use." Here, Faber contended, the complaint contained no allegation that "Faber knew or should have known that Defendant Byrum was improperly accessing Plaintiff's records, or that he had any indication that she was likely to do so."

Second, Dr. Faber argued that the complaint did not allege facts establishing that Dr. Faber was

"the proximate cause of Plaintiff's severe emotional distress." Such cause, he contended, requires both "cause in fact, and a policy decision that liability for an act should extend to include the result." He argued that even if he had not given it to her, "Byrum may have secretly stolen or gained access" to the code, with the same result, and, the "former husband would have received the same psychiatric medical records by serving discovery on Plaintiff," so "the same result would have occurred even without his negligence." Further, Dr. Faber contended, any possible finding of cause is "insulated by the intervening intentional acts" of defendant Byrum.

Third, Faber argued that, while the complaint alleges "severe emotional distress," that is merely a "legal conclusion," and the complaint fails to allege any specific facts such as "neurosis, psychosis, chronic depression, phobia, or any other type of

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severe and disabling emotional or mental condition, which may be generally recognized and diagnosed by professionals trained to do so."

None of these three arguments contained any mention of HIPAA, much less of specific HIPAA requirements.

NC COURT OF APPEALS DECISION

The matter came before Judges Robert C. "Bob" Hunter, Robin E. Hudson, and Ann M. Calabria on October 11, 2006. Pursuant to the panel's preference, no oral argument was held. On December 19, 2006, the unanimous Court of Appeals panel reversed the trial court's dismissal. (Prior to the decision, Judge Hudson was elected to the North Carolina Supreme Court, where she was sworn-in early during 2007.)

The Court's opinion, written by Judge Hunter, postured the "dispositive question" as "whether Plaintiff sufficiently stated a claim for negligent infliction of emotional distress for which relief can be granted," and much of its discussion addressed that issue. In making its assessment, the Court of Appeals applied a pleading standard under which a complaint must contain a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief."

NEGLIGENT CONDUCT FINDNGS IN NC

The Court analyzed the sufficiency of the negligent infliction of emotional distress claim in terms of the three elements advocated by plaintiff, quoted above, and not disputed by Dr. Faber. The

Court construed the complaint to allege that Dr. Faber "negligently engaged in conduct" "by permitting Byrum to use his access code in violation of the rules and regulations of the University Health Systems, Roanoke Chowan Hospital, and HIPAA." The only related issue analyzed by Judge Hunter's opinion was whether it is necessary for the plaintiff to identify in her complaint the "exact rule" said to "establish Dr. Faber's duty to maintain privacy in her confidential medical records." The complaint identified none.

The Court concluded that a plaintiff "is not required in her complaint to cite the exact rule or regulation;" rather, she "only must provide Dr. Faber notice of how she plans to establish the duty that was negligently breached." Judge Hunter reasoned that to require the plaintiff "to describe particular provisions of the rules and regulations would defeat the purpose

of simple notice pleadings." Because Dr. Faber "has been placed on notice that the plaintiff will use the rules and regulations of the University Health Systems, Roanoke Chowan Hospital, and HIPAA to establish the standard of care," plaintiff "has sufficiently pled the standard of care." [Compare to Petitioner's complaint for professional malpractice in the instant case, wherein "Respondents' failure to attain Petitioner's consent prior to revealing the confidential communications. Respondents' conduct deviated from and fell below the standard of care required by licensed professional counselors in general and under like and similar circumstances].

Notice pleading of the type authorized by North Carolina law is common in states that model their pleading rules after the Federal Rules of Civil Procedure. Thus, the ruling here, that only the most general reference to "HIPAA" is sufficient, could open

the door to numerous privacy or security-breach complaints that reflect little, if any, understanding of the covered entity's actual HIPAA-rule obligations. Presumably, specific requirements will be addressed as such lawsuits move toward trial, but the ruling empowers plaintiffs with settlement leverage by preventing defendants from knocking out baseless claims at the beginning of a case.

PROXIMATE CAUSE FINDINGS IN NC

The North Carolina Appellate Court defined the concept of "proximate cause" phrasing it as the "test of proximate cause," in the following way: the test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant.... Questions of proximate cause and foreseeability are questions of fact to be decided by the jury.... Crarely is the court justified in deciding

[proximate cause] as a matter of law")....Thus, since proximate cause is a factual question, not a legal one, it is typically not appropriate to discuss in a motion to dismiss." [Compare to the trial court's directed verdict in the instant case].

The North Carolina Court of Appeals also addressed whether the complaint "sufficiently alleged facts" to state a claim that Dr. Faber's negligence "proximately caused" plaintiff's severe emotional distress. Here the Court felt constrained to follow North Carolina Supreme Court precedent holding that a bare complaint allegation that defendant's negligence "actually and proximately caused severe emotional distress" was adequate. The Court determined the complaint allegations that "Dr. Faber knew of the severe personal animus Byrum had for Plaintiff, Dr. Faber allowed Byrum to use his medical access code, Byrum used the code to access Plaintiff's

confidential medical records, and, consequently, Plaintiff suffered severe emotional distress, humiliation, and mental anguish" were "sufficient." The North Carolina Court of Appeals completely ignored Dr. Faber's arguments that Byrum could have obtained the same information without his negligence or the husband could have obtained it through discovery. Implicitly, the North Carolina Court of Appeals rejected such "it would have happened anyway" arguments.

EMOTIONAL DISTRESS FINDINGS IN NC

Finally, the North Carolina Court of Appeals considered whether plaintiff "alleged sufficient facts to support a claim of severe emotional distress." Here again the Court of Appeals felt itself bound by an earlier North Carolina Supreme Court decisions finding to be adequate allegations that a defendant doctor's negligence in failing to report to potential

parents a heightened risk of sickle-cell disease "caused them 'extreme mental and emotional distress,' specifically referring to Plaintiff-wife's fears regarding her son's health and her resultant sleeplessness." In that case, the Supreme Court had ruled that the allegation was sufficient because it gave the "Defendant notice of the nature and basis of Plaintiffs' claim so as to enable him to answer and prepare for trial." Here, the North Carolina Court of Appeals determined that bare allegations of "severe emotional distress, humiliation, and mental anguish," when "combined with her other factual claims," met that test.

The development of widespread privacy-breach litigation has been inhibited by plaintiffs' inability to demonstrate that any substantial harm or damages resulted from the alleged breach. Here, Dr. Faber's brief had argued that the emotional distress must be

something serious such as "psychosis," "chronic depression" or some other "disabling emotional or mental condition, which may be generally recognized and diagnosed by professionals trained to do so." Judge Hunter's opinion made no mention of this argument but implicitly rejected it by sustaining the sufficiency of the complaint.

HIPAA FINDINGS IN NC APPEAL

The North Carolina Court of Appeals agreed that the complaint [as in the instant case] made no attempt to plead a cause of action created by HIPAA itself, so "dismissal on the grounds that HIPAA does not grant an individual a private cause of action was improper." [Contrast to what may have been a factor in The Supreme Court of Georgia's decision on January 7, 2008 to deny the Petition for Certiorari in the instant case].

The North Carolina Appellate Court indicated that the Plaintiff was not bringing a claim under HIPAA itself, but simply using HIPAA as the "duty of care owed by Dr. Faber with regard to the Privacy of the plaintiff's medical records." This is significant because the North Carolina Appellate Court overturned the trial court's ruling and indicated that this plaintiff could in fact bring a cause of action utilizing HIPAA as a standard or benchmark upon which potential negligence could arise.

The North Carolina Appellate Court agreed with the plaintiff's contention that no claim for an "alleged HIPAA violation was made and therefore dismissal on the grounds that HIPAA does not grant an individual a private cause of action was improper."

The Court expanded upon this 'simple statement' by examining the plaintiff's complaint in

relation to HIPAA. For example the court stated, "in her complaint, plaintiff states that when Dr. Faber provided his medical access code to Byrum, Dr. Faber violated the rules and regulations established by HIPAA. [As in the instant case,] This allegation does not state a cause of action under HIPAA. Rather, plaintiff cites to HIPAA as evidence of the appropriate standard of care, a necessary element of negligence. Since plaintiff made no HIPAA claim, HIPAA is inapplicable beyond providing evidence of the duty of care owed by Dr. Faber with regards to the privacy of plaintiff's medical records."

NC CONCLUSION

Acosta v. Faber, 638 S.E.2d 246 (N.C. App., Dec. 19, 2006)

The decision stands as a reported precedent in North Carolina, holding that vague allusions to HIPAA are sufficient to meet state-law negligence pleading standards in patient information disclosure cases. Additionally, it supports the notion that

actionable emotional distress flowing from treatment information disclosures need not produce any serious condition, but, instead, may consist merely of the plaintiff's self-perceived distress.

CONCLUDING ARUMENT

In consideration of the foregoing, Petitioner respectfully urges this Honorable Court, which has long protected the rights of citizens, to grant Certiorari in this matter, such that:

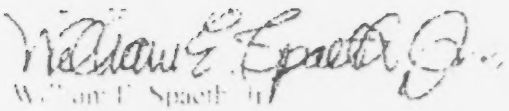
1) The improper utilization of a directed verdict no longer deprives a United States Citizen's right to trial by jury, due process, and the right to remedy for a tort injury;

2) The federal Health Insurance Portability and Accountability Act ("HIPAA") can be consistently interpreted and applied across States, ensuring every United States Citizen's is afforded their

Constitutional rights (U.S. & State) to equal protection of their protected health information.

This the 10th day of May, 2008

Respectfully submitted.



William E. Spaeth, Jr.

PETITIONER PRO SE

CERTIFICATE OF SERVICE

I hereby certify that I have served Respondents' Counsel with a copy of this *Petition for Writ of Certiorari* to The Supreme Court of The United States by depositing a copy of the same in the United States mail, postage pre-paid and properly addressed as follows:

Jennifer R. Bradford & Johnathan Tyler Krawcheck
Attorneys for Respondents
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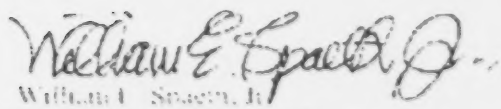
This the 10th day of May, 2008



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Appendix A

SUPREME COURT OF GEORGIA

Case No. S07C1769 Atlanta, February 11, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM E. SPAETH, JR. v. CHEROKEE CENTER FOR CHANGE, INC. et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is hereby ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year above written.

Therese S. Barnes, Clerk

SUPREME COURT OF GEORGIA

Case No. S07C1769 Atlanta, February 11, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM E. SPAETH, JR. v. CHEROKEE CENTER FOR CHANGE, INC., et al.

Upon consideration of the Motion to Stay Remittitur filed in this case, it is hereby ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year above written.

Lynn M. Stinchcomb, Chief Deputy Clerk

SUPREME COURT OF THE STATE GEORGIA

Date: January 07, 2008

William E. Spaeth
P.O. Box 191707
Atlanta, GA 311191707

Case No. S07C1769
WILLIAM E. SPAETH, JR. v. CHEROKEE CENTER FOR CHANGE, INC. et al.

COURT OF APPEALS CASE NO. A07A0718

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

Court of Appeals

of the State of Georgia

Atlanta, July 18, 2007

The Court of Appeals passed the following order

Case No. A07A0718

WILLIAM E. SPAETH, JR. v. CHEROKEE CENTER FOR CHANGE, INC. ET AL.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 18, 2007

I hereby certify that the above is a true extract from the minutes of the Court of Appeals of Georgia. Witness my signature and the seal of said court hereto affixed the day and year above written.

Clerk.

William L. Martin, III

FIRST DIVISION
ANDREWS, P.J.,
ELLINGTON and ADAMS, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed.
(Court of Appeal Rules 4 and 37, September 5, 2002)
http://www.gaappeals.us/rules/

July 3, 2007

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A07A0718. SPAETH v. CHEROKEE CENTER FOR CHANGE, INC. et al.

ELLINGTON, Judge.

William E. Spaeth, Jr. pro se, appeals from an order of the Superior Court of Cherokee County granting defendants Cherokee Center for Change, Inc. and Beth Savino, LPC, a directed verdict in this suit alleging professional malpractice, breach of

contract, and breach of fiduciary duties. Spaeth contends the court erred in granting a directed verdict in favor of the defendants, in refusing to allow two witnesses to testify as experts, and in sustaining certain objections. Finding no error, we affirm.

1. The standard applied in reviewing a trial court's decision to grant a directed verdict is well established:

> The direction of a verdict is proper only where there is no conflict in the evidence as to any material issue, and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict. When there is opinion evidence, circumstantial evidence, presumptions of fact, or evidence subject to more than one reasonable construction, the appellate courts shall carefully scrutinize the grant of

> a directed verdict, because such evidence may be construed as providing the "any evidence" creating a jury question.

(Citations and punctuation omitted.) *Hodges v. Vara*, 268 Ga. App. 815, 818 (1)(a) (603 SE2d 327) (2004). See OCGA § 9-11-50(a) (motion for directed verdict; when made; effect). However, "[t]he mere existence of conflicts in the evidence does not render a directed verdict erroneous if it was demanded either from proof or lack of proof on the controlling issue in the case." (Citation and punctuation omitted.) *Nunley v. Nunley*, 248 Ga. App. 208, 209 (546 SE2d 330) (2001).

All of Spaeth's claims hinge on his contention that he did not consent to the release of confidential communications made during counseling sessions with his marriage and family counselor, Beth Savino of the Cherokee Center for Change, Inc., and that the admission of those communication into evidence

pursuant to a court order during his divorce proceeding resulted in harm to him. Because Spaeth failed to show he was actually harmed by any unauthorized or premature release of the confidential communications, we affirm the directed verdict.

The evidence submitted during trial reveals that Spaeth, upon his divorce lawyer's recommendation, went to Savino for marriage and family counseling and for advice on custody and visitation arrangements for his daughter in the event of a divorce. Spaeth signed a consent form before beginning counseling which authorized treatment for himself, the marriage, and his minor child. By signing the document, Spaeth also agreed to the release of confidential information, "when [such] information is subpoenaed by the courts." The family began counseling with Savino on May 19, 2001. At the end of the first session, Spaeth and his wife asked

Savino "to come up with an appropriate and healthy visitation plan in [the child's] best interest." Spaeth quit counseling after the third session.

On June 28, 2001, the wife's attorney subpoenaed Savino and her records to a hearing scheduled for July 3, 2001. After she was placed under subpoena but before the hearing, Savino told the wife's attorney during a telephone conversation about her "impressions" of the counseling sessions, but Savino contended that she did not disclose any of Spaeth's specific communications at that time. Prior to the scheduled hearing, both divorce attorneys consulted Savino about a visitation schedule for the parties. The July hearing was postponed until August 4, 2001 and on August 2, 1001, Spaeth, through his divorce attorney, signed a consent order drafted by mutual agreement of the parties appointing a

guardian ad litem and giving the guardian access to his counseling records.

The consent order specifically authorized the guardian ad litem to investigate all aspects of the case, to interview the parties, and to inspect all records relating to the child maintained by any health provider. The order authorized Savino, as a mental health provider, to release to the guardian those records relating to the minor child "without necessity of written consent by the parents or the court." Spaeth's own expert opined that the consent order was sufficient to authorize the guardian access to Spaeth's counseling records. Savino made those records available to the guardian, records which included audio recordings of counseling sessions in which Spaeth made threatening remarks to his wife. On the recordings, Spaeth said that he hated his wife, that he wished his wife was dead, and that he

intended to pursue all means to make sure he got custody of his daughter.

Although Spaeth's expert was critical of Savino having discussed her counseling sessions with Spaeth prior to the consent order being issued, opining she "talked with other people without expressed written permission of release of information," he failed to identify exactly what was said to whom and when. Further, Savino testified at trial that she never gave her professional opinion during the divorce proceedings on the issue of who would make a better custodial parent. That was the guardian's role. Spaeth, however, failed to call the guardian ad litem as a witness in the instant action on the issue of her testimony or input, if any, in the underlying divorce proceedings. Spaeth did not submit into evidence at trial any of the documents prepared by the guardian during the divorce proceedings, for example, the

guardian's recommendations on custody and visitation. Spaeth did not submit into evidence the record or any transcripts from the divorce proceedings. Thus, he failed to show how any unauthorized or premature release of his confidential statements, in light of any other evidence adduced in the divorced proceedings, harmed him or affected the outcome of the underlying divorce or custody proceedings. And, finally, Spaeth presented no testimony on what economic damages, for example, his attorney fees during the divorce, could be attributed to Savino's alleged premature disclosure of confidential information.

Given this evidence, the trial court properly granted a directed verdict in favor of Savino and the counseling center. Because Spaeth failed to present proof on the essential element of harm or damage on each of his claims, the trial court properly directed a

verdict in Savino's favor. See *Tante v. Herring*, 264 Ga. 694, 695 (1) (453 SE2d 686) (1994) (professional malpractice claims requires proof of damage proximately caused by the malpractice); *Douglas v. Bigley*, 278 Ga. App. 117, 120(1) (a) (628 Se2d 199) (2006) (breach of fiduciary duty claim requires proof of damage proximately caused by the breach); Lankford v. Trust Co. Bank, 141 Ga. App. 639, 641 (2) (234 SE2d 179) (1977) (breach of contract claim requires proof of damage proximately caused by the breach). For these reasons, we find no error and affirm the directed verdict.

2. Spaeth contends the trial court erred in refusing to allow him or his personal financial planner to testify as experts on the issue of his economic damages. After reviewing Spaeth's discovery responses and the pretrial order, the court held that Spaeth did not timely or properly respond

to Savino's interrogatories by identifying himself or the financial planner, Felicia Kilpatrick, as expert witnesses or by stating the subject matter of the opinions they would be presenting at trial. The judge did, however, allow both Spaeth and Kilpatrick to testify as fact witnesses.

Under Georgia law, a party may require an opposing party to identify all expert witnesses the opposing plans to call at trial and to state the subject about which the expert will testify, the opinions the expert will render, and a summary of the grounds for each opinion. OCGA § 9-11-26(b) (4) A) (i). When, as here, plaintiff fails to timely or properly respond to such a request, the trial court does not abuse its discretion by refusing to allow a party's experts to testify concerning subjects not revealed. *Jones v. Livingston*, 203 Ga. App. 99, 102-103 (4) (416 SE2d 142) (1992).

3. Spaeth contends the trial court "prejudiced the administration of justice" by sustaining defendants' objections to Spaeth's efforts to introduce certain evidence. Spaeth, however, failed to state in brief exactly what those objections were, to explain why the trial court erred in sustaining them, or to present legal argument supporting his claim of error. Consequently, we deem this enumeration of error abandoned. See *Dixon v. MARTA*, 242 Ga. App. 262, 266 (4) (529 SE2d 398) (2000) (legal arguments requires the application of the relevant law to the relevant facts.)

Judgment affirmed. Andrews, P.J. and Adams, J. concur.